United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

75-7307

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

AL DAYON, individually and on behalf of MASTERCRAFT ELECTRONICS CORP.,

Plaintiff-Appellant,

- against -

THE HONORABLE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, THE HONORABLE HAROLD A. STEVENS, THE HONORABLE THEODORE R. KUPFERMAN, THE HONORABLE GEORGE TILZER, THE HONORABLE AARON STEUER and THE HONORABLE EMILIO NUNEZ; JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT,

Defendants-Appellees,

THE HON. VINCENT A. MASSI, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, DOWNE COMMUNICATIONS, INC., EDWARD R. DOWNE, JR., WILLIAM H. KEHL, as Sheriff of the City of New York, and THE AETNA CASUALTY AND SURETY COMPANY,

Defendants.

- -X

75-7307

UNITED STATES COURT OF APPEALS
FILED
JUL 27 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

On Appeal from the United States District Court for the Southern District of New York

---

Petition for Rehearing on behalf of Al Dayon, individually and on behalf of Mastercraft Electronics, Inc.

---

3 copies of
COPY OF THE WITHIN PAPER
RECEIVED
DEPARTMENT OF LAW
JUL 14 1976
NEW YORK CITY OFFICE
ATTORNEY GENERAL

Charles Sutton
Attorney for petitioner,
Al Dayon, Individually
and on behalf of
Mastercraft Electronics, Inc.

Table of Contents

Table of Citations

Table of Citations (Continued)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

AL DAYON, individually and on behalf of MASTERCRAFT ELECTRONICS CORP.,

Plaintiff-Appellant,

- against -

THE HONORABLE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, THE HONORABLE HAROLD A. STEVENS, THE HONORABLE THEODORE R. KUPFERMAN, THE HONORABLE GEORGE TILZER, THE HONORABLE AARON STEUER and THE HONORABLE EMILIO NUNEZ, JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT,

Defendants-Appellees,

THE HON. VINCENT A. MASSI, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, DOWNE COMMUNICATIONS, INC., EDWARD R. DOWNE, JR., WILLIAM H. KEHL, as Sheriff of the City of New York, and THE AETNA CASUALTY AND SURETY COMPANY,

Defendants.

- -X

Docket No. 75-7307

Petition for Rehearing on behalf of Al Dayon, individually and on behalf of Mastercraft Electronics Corp.

TO: The Honorable Judges of the Panel: Hon. Walter R. Mansfield, Hon. James L. Oakes, and Hon. Murray I. Gurfein, Circuit Judges of the United States Court of Appeals for the Second Circuit:

The District Court dismissed the claims for relief made by the petitioner against the respondents Appellate Division Justices on the ground that the claims were so unsubstantial as to preclude the invocation of federal jurisdiction upon the ground that these claims seek to have the federal District Court review mere errors of law committed by the respondents Appellate Division Justices acting within their jurisdiction and that there is no constitutional right to an attachment.

The respondents have urged that Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) is decisive of this case and forecloses the issue presented by the petitioner's claims against the respondents Appellate Division Justices and renders his claims against them too unsubstantial for federal jurisdiction to be invoked.

Point I

The Federal question is substantial and Rooker v. Fidelity Trust Co. is not applicable and does not foreclose the Federal question presented.

It is most respectfully urged that Rooker v. Fidelity Trust Co., 216 U.S. 413 (1923) does not apply to this action, that the order of the Appellate Division dated February 13, 1973 was not a "mere error of law", committed in the exercise of and within the jurisdiction of the respondents, but rather, that it was an arbitrary order which was made in excess of and beyond the jurisdiction of the said Appellate Division Justices, in vio-

lation of the settled law of the State of New York and contrary to undisputed and conceded facts which deprived the petitioner of his federal constitutional rights to due process of law and equal protection of the law, which is a federal claim created by the federal constitution and by federal law, namely 42 U.S.C. Sec. 1983.

Rooker v. Fidelity Trust Co., 216 U.S. 413 (1923) was not a Civil Rights action. Rooker, supra, involved an action between citizens of the same state, and

> "The grounds advanced for resorting to the District Court are that the judgment (of the State Court) was rendered and affirmed in contravention of the contract clause of the Constitution of the United States and the due process of law and equal protection clauses of the Fourteenth Amendment, in that it gave effect to a state statute alleged to be in conflict with those clauses and did not give effect to a prior decision in the same case of the Supreme Court of the State which is alleged to have become the 'law of the case'. The District Court was of the opinion that the suit was not within the jurisdiction as defined by Congress, and on that ground dismissed the bill. The plaintiffs have appealed directly to this Court under Section 238 of the Judicial Code.
>
> The appellees move that the appeal be dismissed, or in the alternative that the decree be affirmed.
>
> The appeal is within the first clause of Section 238; so that the motion to dismiss must be overruled. But the suit is so plainly not within the District Court's jurisdiction as defined by Congress that the motion to affirm must be sustained.
>
> It affirmatively appears from the bill that the judgment was rendered in a cause wherein the Circuit Court had jurisdiction of both the subject matter and the parties; that a full hearing was had therein; that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the State on an appeal by the plaintiffs. 191 Ind. 141. If the constitutional questions

> stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication (cases cited). Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. Judicial Code Section 237, as amended September 6, 1916, c. 448, Section 2, 39 Stat. 726. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Court is strictly original. Judicial Code, Section 24." (Matter in parenthesis added). Rooker v. Fidelity Trust Co., 263 U.S. 413, 414-416(1923). **(Underscoring added).**

The Rooker case history shows that 263 U.S. 416 (1923) was the second Rooker case, involving the very same parties on the very same issues, to reach the attention of the Supreme Court.

The first Rooker v. Fidelity Trust Co. case, 261 U.S. 114 (1922) began in the state court of Indiana. The Rookers, husband and wife, being financially embarrassed, transferred certain land to a corporate trustee in accordance with two deeds and a trust agreement, for their own benefit. Thereafter differences arose between the Rookers and the trust company. The case was tried in the state court. In the course of the action an interlocutory appeal had been taken to the Indiana Supreme Court, the highest state appellate court, which rendered a decision which the Rookers considered favorable to

themselves. Thereafter the action was tried on the merits and a final judgment was entered on the merits which was responsive to the issues presented. The Rookers successively appealed; the appeal was heard and decided by the Indiana Supreme Court. The Indiana Supreme Court affirmed the final judgment. The Rookers filed a writ of error to the Supreme Court (261 U.S. 114).

The writ of error was dismissed for the reason that the writ of error "did not draw into question the validity of an authority exercised under a State in the sense of the writ of error provision." Rooker v. Fidelity Trust Co., 261 U.S. 114, 118 (1922). Rooker had not raised any federal constitutional claim in the state court action except by a petition for rehearing; the Supreme Court held that this was untimely and was not sufficient to sustain the writ of error. The Supreme Court in the first Rooker v. Fidelity Trust Co., 261 U.S. 114, 118 (1922), further held that this claim of deprivation of federal constitutional rights

> "did not draw in question the validity of an authority exercised under a State in the sense of the writ of error provision".

Rooker contended there that his federal constitutional rights under the contract clause had been infringed when the Indiana Supreme Court, highest state appellate court, on the appeal from the final judgment allegedly departed from a decision it

had made on a prior interlocutory appeal. Rooker contended that the decision had established a "law of the case", on the interlocutory appeal, which the Indiana Supreme Court could not alter on the later appeal from the final judgment. The baselessness of that contention is obvious considering simply the doctrine of "law of the case." The Supreme Court held:

> "Plainly this claim does not bring the case within the writ of error provision. Both decisions were in the same case. The first was interlocutory (185 Ind. 187-188); the second final. Concededly the case was properly before the court on the second appeal; the plaintiffs evidently thought so, for they took it there. Whether the second decision followed or departed from the first, it was a judicial act, not legislative. The contract clause of the Constitution, as the words show, is directed against impairment by legislative action, not against a change in judicial decision. It has no bearing on the authority of an appellate court, when a case is brought before it a second time, to determine the effect to be given to the decision when the case was first there. (Cases cited). Assuming the objection to a change in decision was reasonably presented, it amounted to nothing more than saying that in the plaintiff's opinion the court should follow the first decision. It did not draw into question the validity of an authority exercised under a State in the sense of the writ of error provision. Philadelphia & Reading Coal & Iron Co., v. Gilbert, 245 U.S. 162, 166; Stadelman v. Miner, 246 U.S. 544, 546; Moss v. Ramey, 239 U.S. 538, 546; Gasquet v. Lapeyre, 242 U.S. 367, 369. Whether there was any substantial change in decision we need not inquire." (Underscoring and matter in parenthesis added). Rooker v. Fidelity Trust Co., 261 U.S. 114, 118 (1922).

It is abundantly clear that in both Rooker cases (261 U.S. 114 and 263 U.S. 416) that no contention at all was made or was involved that the state court had acted arbitrar-

ily, or in excess of its jurisdiction, or beyond the authority granted by the statutes, or contrary to the statutes, or that the state court had failed to accord any hearing on the merits, or that the state court order was not responsive to the issues, or that the state court order was not a final order and was not appealable to any state court and was also not appealable, directly, to the Supreme Court (see Largent v. Texas, 318 U.S. 418, 421, 422 (1942)) since it was not a final order; the only redress that the petitioner has open to it is by this Civil Rights action, failing which, he has no redress at all for the claimed deprivations of federal constitutional rights. See, Lombard v. Board of Education, 502 F. 2d 631, 637 (2d Cir. 1974).

The Supreme Court in the second Rooker v. Fidelity Trust Co., 263 U.S. 413, 415 (1923) indicated quite clearly that if Rooker had alleged and showed in his bill in equity to the federal district court that the state court had acted arbitrarily, or in excess of its jurisdiction, or if the judgment was not responsive to the issues, or that Rooker had not been accorded a full hearing, then the Supreme Court would have held that there was federal jurisdiction and that the federal constitutional question was substantial:

> "Some parts of the bill speak of the judgment as given without jurisdiction and absolutely void; ...." Rooker v. Fidelity Trust Co., 263 U.S. 413, 415 (1923).

The Supreme Court, immediately discounted the

language as not being intended, stating:

> "but this is merely mistaken characterization. A reading of the entire bill shows indubitably that there was full jurisdiction in the state courts and that the bill at best is merely an attempt to get rid of the judgment for alleged errors committed in the exercise of that jurisdiction." (Underscoring added). Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923).

The Supreme Court plainly showed that Rooker involved a case in which the state court had full jurisdiction and did not act outside of its jurisdiction and did not act beyond its power, or beyond its jurisdiction, or contrary to a controlling statute. The second Rooker case also was clearly and patently affected by the principle of res judicata.

The Supreme Court clearly stated that it

> "affirmatively appears from the bill that the judgment was rendered in a cause wherein the circuit court had jurisdiction of both the subject matter and the parties; that a full hearing was had therein; that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the State on an appeal by the plaintiffs." (Underscoring supplied). Rooker v. Fidelity Trust Co., 263 U.S. 413, 415 (1923).

This case is completely distinguishable from Rooker v. Fidelity Trust Co., 263 U.S. 416 (1923) both on the facts and on the law. (App. Brief pp. 15-18; App. Appendix pp. 38-44). The petitioner, in his claim against the respondents, alleged and showed that they had acted arbitrarily in making

the order complained of, beyond their power and outside of their jurisdiction, and not that the order was merely erroneously made within their jurisdiction and by the exercise of a power which they had.

In Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), the parties in the federal action were the same parties as in the state action and the issues were the same. The principle of res judicata was applicable.

In the case at bar the parties in this federal action are not the same as the parties in the Dayon state attachment action against Downe Communications, Inc. and others. The issues in this federal action are totally different from those in that Dayon State attachment action. Neither res judicata nor collateral estoppel are applicable. In this case, the claim against the respondents shows that they acted arbitrarily, contrary to the established and conceded facts and without any basis in fact, Postal Telegraph Cable Co. v. Newport, 247 U.S. 464 (1918), Time, Inc. v. Firestone, _____ U.S. _____ 96 S. Ct. 958, 969, 970 (1976), and beyond, in excess of, and outside of their power and jurisdiction in such cases, and with an eye to purposefully discriminating against the petitioner, in the application of the state attachment statutes. McFarland v. American Sugar Ref. Co., 241 U.S. 79. 86, 87.

This Court in Lombard v. Board of Education, 502 F.2d

631, 635 (2d Cir. 1974), a Civil Rights action under 42 U.S.C. Section 1983 held in regard to challenges made in that case on the grounds of res judicata or claim preclusion:

> "Whether it is called res judicata or claim preclusion, we think for several reasons that policy considerations should not permit the extension of the res judicata doctrine in this case to issues of procedural due process which are said to raise claims under 42 U.S.C. Section 1983.
>
> First, when the Civil Rights Act was authoritatively interpreted in Monroe v. Pape, 365 U.S. 167, 183, 81 S. Ct. 473, 482, 5 L.Ed. 2d 492 (1961) the Supreme Court said:
>
> > "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.'
>
> To apply res judicata to a remedy which 'need not be first sought and refused' in the state court, and which actually was not sought would be to overrule the essence of Monroe v. Pape, 307 U.S. 268, 274, 59 S. Ct. 872, 83 L. Ed. 1281 (1939)....."

The federal constitutional questions presented in this case were not in existence, much less were they presented to the state court. The federal constitutional issues were created by the arbitrary, illegal, null and void order, dated February 13, 1973 of the respondents which vacated the Dayon order of attachment in the Dayon state attachment action against Downe Communications, Inc. and others. See, Tang v. Appellate Division, 487 F. 2d 138 (2d Cir. 1973).

The order of the respondents complained of was not a "mere error of law" committed in the exercise of and within

the jurisdiction of the respondents, but rather it was an arbitrary and illegal order made in excess of and beyond the jurisdiction of the respondents.

The Supreme Court in Windsor v. McVeigh, 93 U.S. 274, 282, 283 (1876) noted the distinction between acts of a court which are "mere errors of law" committed within the proper jurisdiction of a court, and those which "transcend the power conferred by the law", and are beyond the jurisdiction of the court.

> "Though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things and cannot transcend the power conferred by the law. If for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous; <u>they would be absolutely void because the court in rendering them would transcend the limits of its authority in those cases</u>. See the language of Mr. Justice Miller, to the same purport, in the case of Ex parte Lange, 18 Wall. 163. So it was held by this court in Bigelow v. Forrest, 9 id. 351, that a judgment in a confiscation case, condemning the fee of the property, was void for the remainder, after the termination of the life-estate of the owner. To the objection that the decree was conclusive that the entire fee was confiscated, Mr.

Justice Strong, speaking the unanimous opinion of the court, replied: 'Doubtless a decree of a court, having jurisdiction to make the decree, cannot be impeached collaterally; but, under the act of Congress, the District Court had no power to order a sale which should confer upon the purchaser outlasting the life of French Forrest (the owner). Had it done so it would have transcended its jurisdiction.' Id. 350.

So a departure from established modes of procedure will often render the judgment void; thus the sentence of a person charged with felony, upon conviction by the court, without intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the Chancellor. And the reason is, that the courts are not authorized to exert their power in that way.

The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it. The statement of the doctrine by Mr. Justice Swayne, in the case of Cornell v. Williams, reported in the 20th of Wallace, is more accurate. 'The jurisdiction', says the justice, 'having attached in the case, everything done within the power of that jurisdiction, when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud.' 20 Wall. 250." (Underscoring added). Windsor v. McVeigh, 93 U.S. 274, 282, 283 (1876).

In the case at bar the respondents Appellate Division Justices vacated the Dayon order of attachment upon the ground that the first four causes of action of the complaint were insufficient as a pleading; there is no authority in law for such an order; under the New York attachment statutes, CPLR 6201, 6212, and 6223, and pursuant to the settled law of

the State of New York, a complaint as a pleading is utterly irrelevant and unnecessary. Furthermore, there was no basis in fact for such an order: The state defendants had conceded all of the facts necessary to sustain the Dayon order of attachment as the complaint shows at pars. 25, 28, 48, 67 (Appendix pp. 26-28, 35, 42-43). Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 473-476 (1917); Time, Inc. v. Firestone, _____ U.S. _____, 96 S. Ct. 958, 969, 970 (1976).

In Thompson v. Louisville, 362 U.S. 199 (1960), Thompson was arrested, charged, and convicted for committing certain conduct and speech which were not violations of any law of Louisville, Kentucky. The Supreme Court held that convicting and punishing Thompson for such donduct and speech without evidence of his guilt, violated Thompson's constitutional rights to due process of law. The Court held:

> "Just as 'Conviction upon a charge not made would be sheer denial of due process', so is it a violation of due process to convict and punish a man without evidence of his guilt." Thompson v. Louisville, 362 U.S. 199, 80 A.L.R. 2d 1355, 1361 (1960).

Similarly in this case, it is a violation of petitioner's federal constitutional right to due process of law and equal protection of the law for the respondents to vacate the Dayon state order of attachment upon a ground that has absolutely no basis, and no relevance to the law governing attachments and entirely outside of the state's statutory

scheme for attachments. See, Thompson v. Louisville, 362 U.S. 199, 80 A.L.R. 2d 1355, 1360, 1361 (1960).

The State of New York itself deems that only the sufficiency of affidavits pursuant to NYCPLR 6212(a) and 6201 is to be considered in granting, denying or vacating an order of attachment. As noted above the claim for relief alleges and shows that the state attachment defendant Downe Communications, Inc. had conceded the facts establishing the petitioner's right to the order of attachment (Appendix pp. 26-28, 35, 42-43, pars. 25, 28, 48, 67). The respondents Appellate Division Justices, however, vacated the Dayon order of attachment without reference to that very factor which the State of New York deemed fundamental to its statutory scheme.

The Supreme Court, in Stanley v. Illinois, 405 U.S. _____, 92 S. Ct. 1208, 1213 (1972) stated:

> "In Bell v. Burson, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971) we found a scheme repugnant to the Due Process Clause because it deprived a driver of his license without reference to the very factor (there fault in driving, here fitness as a parent) that the State deemed fundamental to its statutory scheme."

The respondents showed clearly by their order and decision in the Dayon attachment action dated February 13, 1973 (Appendix pp. 36, 37) that they did not even consider the affidavits submitted in support of the Dayon order of attachment and that the vacatur of the order of attachment was made

on a basis which was entirely outside of the law and beyond the jurisdiction of the respondents. (Dayon Brief, pp. 15-22).

The Supreme Court in Bell v. Burson, 402 U.S. 535, 542 (1971) held:

> "It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision ..... does not meet this standard."

The Supreme Court in Wisconsin v. Constantinau, 400 U.S. 433, 436 (1971) stated that

> "It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat."

Since it is a denial of due process for any government agency to fail to follow its own regulations providing for procedural safeguards to persons involved in an adjudicative process before it, Government of Canal Zone v. Brooks, 427 F. 2d 346 (_____ Cir. 1970), it is also a denial of due process for a court to exceed its jurisdiction and to arbitrarily assume and to arbitrarily exercise a power not granted to it by law. See, Sterling v. Constantin, 287 U.S. 378, 397-399 (1932).

In Steffel v. Thompson, _____U.S._____, 39 L. Ed. 2d 505, 523 (1974), the Supreme Court held that

"The solitary individual who suffers a deprivation of his constitutional rights is no less deserving of redress than one who suffers together with others."

Dayon, having applied for the state order of attachment, and having posted a $100,000.00 attachment bond pursuant to NYCPLR 6211(b), and having been granted the state order of attachment by the New York State Supreme Court, and having proceeded through the Sheriff of the City of New York to enforce the order of attachment, acquired a vested interest therein, and acquired and possessed a constitutional right of property therein, Lynch v. Household Finance, 405 U.S. 538 (1972) which the respondents could not deprive him of without due process of law and according to the equal protection of the law as required under the federal constitution.

The Supreme Court in Graham v. Richardson, 403 U.S. ____ 374, 91 S. Ct. 1848, 1853 (1971), noted that

"... this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'. Sherbert v. Verner, 374 U.S. 398, 404, 83 S. Ct. 1790, 1794, 10 L. Ed. 2d 965 (1963); Shapiro v. Thompson, 394 U.S. at 627, n. 6, 89 S. Ct. at 1327; Goldberg v. Kelly, 397 U.S. 254, 262, 90 S. Ct. 1011, 1017, 25 L. Ed. 2d 287, (1970); Bell v. Burson, 402 U.S. 535, 539, 91 S. Ct. 1586, 1589, 29 L. Ed. 2d 90 (1971)."

"....(T)he settled construction of the (Fourteenth) Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed and deals with such a contingency. It provides, therefore, for a case

where one who is in possession of state power uses that power for the doing of wrongs which the amendment forbids even although the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power .... in truth the Amendment contemplates the possibility of state officers abusing the powers lawfully conferred upon them by doing wrongs prohibited by the amendment...." Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278, 287, 288 (1912).

Point II

Petitioner was denied federal constitutional right to equal protection of the law.

The petitioner Dayon has been deprived of his order of attachment and has been subjected to the loss of the benefits of the order of attachment to which every other person in the State of New York would have had under similar circumstances, and in addition, the $100,000.00 surety bond has been taken thereby, upon a basis which has no place and no relevance whatever under the New York statutes governing attachment, and under the settled law of the State of New York, con-

struing and applying such statutes, by the action of the respondents acting arbitrarily and without jurisdiction.

The attachment statutes do not authorize and never authorized any court to vacate an order of attachment for alleged insufficiency of a complaint as a pleading. The respondents, however, singling out only this petitioner, have done so.

The Supreme Court in Snowden v. Hughes, 321 U.S. at 15, 16 (1943) noted:

> "However, in forbidding a state to 'deny to any person within its jurisdiction the equal protection of the laws', the Fourteenth Amendment does not permit a state to deny the equal protection of its laws because such denial is not wholesale. The talk in some cases about systematic discrimination is only a way of indicating that in order to give rise to a constitutional grievance a departure from a norm must be rooted in design and not derive merely from error or fallible judgment. Speaking of a situation in which conscious discrimination by a state touches 'the plaintiff alone', this Court tersely expressed the governing principle by observing that
>
> > 'We suppose that no one would contend that the plaintiff was given equal protection of the laws'. McFarland v. American Sugar Ref. Co., 241 U.S. 79, 86, 87, 60 L. Ed. 899, 904, 36 L. Ed. 498.
>
> And if the highest court of the state should candidly deny to one litigant a rule of law which it concededly would apply to all other litigants in similar situations, could it escape condemnation as an unjust discrimination and therefore a denial of the equal protection of the laws?"

Point III

The very subject matter of this claim is Federal and the doctrine of substantiality is not applicable.

It is respectfully submitted that the doctrine of substantiality

> "has no application to a case brought in a Federal court where the very subject matter of the controversy is Federal..." Swafford v. Templeton, 185 U.S. 487, 493, 494 (1901).

In this case "the very subject matter of the controversy is Federal", Swafford v. Templeton, supra, in that the very right of action is created by the Federal Statute, 42 U.S.C. Section 1983 and jurisdiction is authorized by 28 U.S.C. Section 1343(3).

A federal Civil Rights action "is plainly federal in origin and nature..." McNeese v. Board of Education, 373 U.S. 668, 674 (1963).

Mr. Justice Douglas in McNeese v. Board of Education, 373 U.S. 668, 674 (1963) wrote:

> "We have, however, in the present case no underlying issue of state law controlling this litigation. The right alleged is as plainly federal in origin and nature as those vindicated in Brown v. Board of Education, 347 U.S. 483 (74 S. Ct. 686, 98 L. Ed. 873). Nor is the federal right in any way entangled in a skein of state law that must be untangled before the federal case can proceed. For petitioners

assert that respondents have been and are depriving them of rights protected by the Fourteenth Amendment. It is immaterial whether respondent's conduct is legal or illegal as a matter of state law. Monroe v. Pape, ... 365 U.S. at 171-187 (81 S. Ct. 473), at 475-484). Such claims are entitled to be adjudicated in the federal courts. Monroe v. Pape, supra, 365 U.S. at 183 (81 S. Ct. 473) at 481); Gayle v. Browder, 352 U.S. 903 (77 S. Ct. 145, 1 L. Ed. 2d 114), affirming 142 F. Supp. 707; Borders v. Rippy, 5 Cir. 247 F. 2d 268, 271. Cf., e.g. Lane v. Wilson, 307 U.S. 268 (59 S. Ct. 872, 83 L. Ed. 1281); Smith v. Allwright, 321 U.S. 649 (64 S. Ct. 757, 88 L. Ed. 987); Schnell v. Davis; 336 U.S. 933 (69 S. Ct. 749, 93 L. Ed. 1093), affirming 81 F. Supp. 872; Turner v. Memphis, 369 U.S. 350 (82 S. Ct. 805, 7 L. Ed. 2d 762)."

Point IV

A court has no power to impose costs in the case of a dismissal for want of jurisdiction.

A court has no power to impose costs in the case of a dismissal for want of jurisdiction.

Deming v. Carlisle Packing Co.,
226 U.S. 102, 110 (1912).

Conclusion

It is respectfully urged that the judgment of this Court dated June 16, 1976 be vacated and that the order on appeal be reversed and the respondents' motion to dismiss the petitioner's claim for relief against respondents be denied.

Respectfully submitted,

Charles Sutton
Attorney for Petitioner Dayon
299 Broadway
New York, New York
212 - 964 - 8612

Dated: July 10, 1976